

CONFIDENTIAL COMMUNICATIONS CO.

IBLA 92-525

Decided November 7, 1994

Appeal from a decision of the Area Manager, Tucson Resource Area Office, Tucson, Arizona, approving a right-of-way reservation for communication site facilities. AZA 25996.

Set aside and remanded.

1. Federal Land Policy and Management Act of 1976: Rights-of-Way--Rights-of-Way: Applications--Rules of Practice: Protests

In adjudicating a protest against an application for communications right-of-way, BLM is required by 43 CFR 4.450-2 only to consider and decide matters which are proposed to be done. Where an application for right-of-way has already matured into a functioning use, a protest against the proposal upon which the use was initiated must be dismissed.

2. Communication Sites--Federal Land Policy and Management Act of 1976: Rights-of-Way--Rights-of-Way: Federal Land Policy and Management Act of 1976

A BLM decision approving a reservation for a communication site right-of-way under FLPMA, 43 U.S.C. § 1767(a) (1988), is an exercise of discretion that will be affirmed when the record shows the decision to be a reasoned analysis of the factors involved, made in due regard for the public interest, and no sufficient reason to disturb the decision is shown.

3. Administrative Procedure: Administrative Record--Administrative Procedure: Administrative Review--Appeals: Generally--Rules of Practice: Appeals: Generally

An administrative decision is properly set aside and remanded where it is not supported by a case record providing the Board with the evidence necessary for an objective, independent review of the basis for the decision.

APPEARANCES: David W. Klein, Phoenix, Arizona, for appellant; Richard R. Greenfield, Esq., Phoenix, Arizona, for the Bureau of Land Management.

#### OPINION BY ADMINISTRATIVE JUDGE KELLY

Confidential Communications Company (CCC) has appealed from a May 18, 1992, decision by the Area Manager, Tucson Resource Area, Tucson, Arizona, Bureau of Land Management (BLM), approving a communication site right-of-way reservation to the United States Bureau of Reclamation (BOR). The approximate 1-acre reservation is located on Newman Peak in the NE¼ T. 8 S., R. 9 E., sec. 22, Gila and Salt River Meridian, in the Picacho Mountains in Arizona. The reservation is for a microwave and mobile radio repeater site needed to relay communications necessary to the management of BOR's Central Arizona Project.

Prior to the creation of this reservation, Newman Peak had been the site of three communication right-of-way sites: CCC, an assignee of Armor Radio Communications; and the Department of Energy, Western Area Power Administration (WAPA) shared the area. Facilities for the management of the Central Arizona Project were originally constructed in 1987 on Newman Peak under WAPA's permit AZA 17441, but operated under a separate BLM serial number, AZA 17441-A. This arrangement was made because, at the time, Newman Peak was located within the Picacho Mountain Wilderness Study Area. BLM lifted wilderness restrictions, however, subsequent to passage of the Arizona Desert Wilderness Act of 1990, which did not include Newman Peak within lands designated as wilderness.

On October 9, 1991, officials of WAPA, the Central Arizona Water Conservation District (CAWCD), BOR, and BLM met on Newman Peak to discuss the possibility of moving BOR's equipment off the WAPA right-of-way and onto its own site. Plans for a solar operation were discussed, as were plans to create an additional helipad. As a result of that meeting, on October 11, 1991, interested parties were notified that WAPA was proposing to relocate the helipad, which had been adjacent to the CCC right-of-way, to a site east of the potential BOR right-of-way.

On October 24, 1991, BOR filed a right-of-way application with BLM requesting authority for its own site. The application averred that BOR needed the microwave site to relay communications to various pumping plants along the Tucson Aqueduct. According to the application, "[t]he system will be used continuously throughout the year to operate unmanned pumping plants, to provide telephone and data service, and to provide mobile communications capability to canal maintenance operators."

BOR requested an approximate 100- by 200-foot area in which to locate a 12- by 30-foot equipment building, a 12- by 16-foot battery building, solar panels, emergency power generator, propane tanks, and a 60-foot tower. All existing BOR and CAWCD equipment on the WAPA site was to be moved to the new site. The operation and maintenance of the project would be under the direction of CAWCD, which, according to BOR's application, "has built

5 similar microwave sites for the \* \* \* [Central Arizona Project] on lands administered by the BLM."

On February 6, 1992, pursuant to 43 CFR 4.450-2, CCC filed a protest to the proposed BOR reservation. CCC believed that installation of the solar panels would "materially interfere with its communications and other operations on Newman Peak." CCC stated that BLM had restricted CCC's activities on Newman Peak so as not to impair the environment, and the construction of solar panels would be in direct conflict with "BLM's purpose and past operating history of protecting the landscape and environment on Newman Peak." CCC further alleged that, pursuant to its own right-of-way, electricity from CCC's power line must be made available to other Newman Peak operators at a negotiated price, and CAWCD's installation of solar panels would circumvent this stipulation. CCC maintained that CAWCD should be required to conduct good faith negotiations with it for use of its power line.

On March 6, 1992, BLM responded to CCC that, until recently, Newman Peak had been located within a wilderness study area. BLM informed CCC that the Phoenix Resource Management Plan, which became effective in September 1989, identified Newman Peak as a communication site pending congressional determination of the wilderness suitability of the location. When the land was not designated wilderness in the Arizona Desert Wilderness Act of 1990, BLM lifted wilderness restrictions. BLM further responded that solar panels are a common auxiliary power source for communication sites, and are not intended to replace commercial power, although there is no requirement that other users use commercial power. BLM further averred that location of the solar panels should not interfere with CCC's operations.

On March 27, 1992, CCC, through its attorney, filed an appeal of BLM's March 6, 1992 letter. By letter dated April 2, 1992, BLM informed CCC that its appeal was premature, as BLM had not yet rendered a decision approving BOR's right-of-way application. By decision record dated May 18, 1992, BLM found that the proposed use would not significantly impact the environment, and approved the right-of-way reservation with stipulations. CCC timely appealed.

While CCC's statement of reasons (SOR) on appeal advances several arguments, it challenges BLM's decision on essentially three grounds. CCC alleges that it was not given fair and adequate notice of BLM action concerning the other right-of-way usages on Newman's Peak, including authorization for a tower constructed on the Armor site in 1983, and of changes, such as the construction of solar panels, and the heliport relocation, which materially affect its operation. CCC contends that the additional BOR usage on Newman Peak will inhibit safe helicopter access to its site. Furthermore, CCC alleges that installation of solar panels violates its own right-of-way grant which requires other users to negotiate with CCC for power usage, is unnecessary and environmentally damaging, and will further inhibit safe helicopter access.

BLM responds that appellant was given notice and opportunity to comment on BOR's right-of-way application and in fact did comment by letters dated February 6 and March 27, 1992. Previous right-of-way grants, BLM argues, are not properly before the Board in this appeal. Even if they were, BLM alleges, proper notice of all right-of-way applications was provided to CCC. BLM avers that the construction of an additional helipad ensures that landings on Newman Peak are more safe, not less. BLM takes exception to CCC's characterization of the installation of solar panels as environmentally unsound, arguing that they are more safe than the propane system previously used by BOR.

[1] The record does not support appellant's allegations that it was not given adequate notice of additional right-of-way usages on Newman Peak, including the Armor site, or changes associated with them. BLM issued notices dated October 11, 1991, and January 7, 1992, respectively, to inform interested parties that WAPA proposed to relocate the helipad and that BOR had filed an application to construct a communication site. CCC admits in its SOR that it received these notices.

We find CCC's appeal of BLM's authorization of the tower on the Armor site to be untimely. BLM's Departmental regulation 43 CFR 4.450-2 provides that "any objection raised by any person to any action proposed to be taken in any proceeding before the Bureau will be deemed to be a protest \* \* \*." In adjudicating a protest against an application for communications right-of-way, BLM is required by 43 CFR 4.450-2 only to consider and decide matters which are proposed to be done. Where an application for right-of-way has already matured into a functioning use, a protest against the proposal upon which the use was initiated must be dismissed. Willamette Logging Communications, Inc., 86 IBLA 77, 80 (1985). Likewise, to the extent CCC has appealed BLM's authorization of the new helipad, we find it to be untimely. CCC did not file a protest to the proposed action.

[2] Sections 501(a)(5) and 507 of the Federal Land Policy and Management Act of 1976 (FLPMA) authorize the Secretary of the Interior to grant to private entities or to reserve for the Federal Government rights-of-way over public lands for "systems of communication." 43 U.S.C. § 1761(a)(5) (1988); 43 U.S.C. § 1767 (1988). Approval of a right-of-way application is a matter of discretion. Dale Lundington, 94 IBLA 167, 172 (1986); Lower Valley Power & Light, Inc., 82 IBLA 216 (1984). A BLM decision approving or denying a right-of-way application will be affirmed when the record shows the decision to be a reasoned analysis of the factors involved, made in due regard for the public interest, and no sufficient reason to disturb the decision is shown. Coy Brown, 115 IBLA 347, 356 (1990); Glenwood Mobile Radio Co., 106 IBLA 39, 41-42 (1988).

We reject CCC's argument that installation of solar panels on BOR's site inhibits and conflicts with its own right-of-way grant. CCC's grant reserves to the United States "the right to grant additional rights-of-way or permits for compatible uses, on, over, under or adjacent to the lands

involved in this grant \* \* \* (CCC Right-of-Way at 2). Furthermore, the grant stipulates that, "[d]uring the period of this grant, the \* \* \* [right-of-way] holder agrees, upon notification by the authorized officer, to take necessary actions, at his expense, to conform to any future communication site plans developed by BLM for the area." Id.

CCC argues that BOR's installation of solar panels on Newman Peak "will cause senseless damage to the natural environment at Newman Peak" (SOR at 2). Appellant has provided no evidence, however, to support its assertion. An appellant who does not show adequate reason for appeal and, as appropriate, support the allegation with argument or evidence showing error cannot be afforded favorable consideration. Joe B. Kearl, 119 IBLA 122, 124 (1991); Add-Ventures Ltd., 95 IBLA 44, 50 (1986). A party challenging a BLM determination has the burden of establishing by a preponderance of the evidence that the determination is erroneous. Bender v. Clark, 744 F.2d 1424, 1429 (10th Cir. 1984). Absent a showing of error, we must affirm BLM's decision.

CCC maintains that installation of solar panels adjacent to the new helipad will limit safe access. BLM responds that the new helipad permits safer landings and allows flight capabilities not available at the existing site (BLM Answer at 3), including allowing take-off into the wind when it comes from the east (BLM Memorandum dated July 7, 1992). According to BLM's Answer, CCC is authorized to use either the new or the existing helipad, which is adjacent to CCC's right-of-way site (BLM Answer at 4).

BLM further maintains that since CCC did not protest the helipad relocation, it is now prohibited from an appeal of the issue. BLM did not notify CCC of the BOR right-of-way application, however, until January 7, 1992. By that time, a protest of the October 11, 1991, notice of the helipad relocation would have been untimely. Before notice of the BOR communication site plan, appellant may have had no reason to appeal the helipad location. While appellant cannot protest the location of the new helipad, we hold that appeal of whether granting the BOR site application will impact safe access to the new helipad site is properly before the Board, as appellant timely protested a proposed use, and therefore has met the requirements of 43 CFR 4.450-2.

A topographical diagram of right-of-way sites on Newman Peak reveals that the four communication sites are located at an elevation of 4,480 feet above sea level. The new helipad is located northeast of the BOR site, which abuts the northern WAPA site boundary. The Armor site abuts the WAPA site from the south. CCC's site abuts WAPA's western boundary from the southwest, and Armor's western boundary from the northwest. The new helipad is situated within the 4,480-foot elevation line some distance outside of BOR's eastern boundary, which places it to the far northeast of CCC's site. Other diagrams indicate that the old helipad abuts both CCC's and WAPA's western boundaries. The BOR site is enclosed by a fence.

The Decision Record, however, does not describe the specifics of the site itself, but is limited to a determination that the action conforms to existing relevant environmental documentation, including Categorical Exclusion No. APO-91-16, approved by BOR on May 29, 1991, Environmental Assessment AZ-025-82-093, approved September 23, 1982, for WAPA's right-of-way, and the Phoenix Resource Management Plan and Final Environmental Impact Statement, approved September 29, 1989.

A memorandum dated July 7, 1992, from the Safford District Manager to the Arizona State Director addresses CCC's SOR on appeal with regard to the helipad location vis a vis the BOR right-of-way grant by averring that the new right-of-way will not interfere with safe landings on the new pad. The memorandum, however, does not provide factual data to support its conclusions.

A photograph attached to the Decision Record as Exhibit B reveals the presence of stakes showing the location of proposed solar panels in near proximity to a grounded helicopter. The record does not indicate whether the helicopter is on the new heliport site, nor can the impact of the finished solar panels on the landing site be determined.

While the Decision Record avers that "[t]he proposed action conforms with the Phoenix Resource Management Plan and is not in conflict with any state or local planning or zoning," that "[t]he proposed action will not result in any undue or unnecessary environmental degradation," and that "[p]otential environmental and other impacts that may result from the proposed action can be mitigated by including the standard terms and conditions listed below in the right-of-way reservation," (Decision at 1-2); it does not describe in sufficient factual detail the action to be undertaken. Nor do BLM's comments to appellant's protest address the impacts of the proposed action on helicopter access.

[3] An administrative decision is properly set aside and remanded if it is not supported by a case record providing this Board the information necessary for an objective, independent review of the basis for the decision. Shell Offshore, Inc., 113 IBLA 226, 233, 97 I.D. 74, 77 (1990); Fred D. Zerfoss, 81 IBLA 14 (1984). It is impossible for this Board to engage in intelligent, objective review of the agency's decision without knowing the circumstances leading to the action and the agency's reasons for taking the action. See Soderberg Rawhide Ranch Co., 63 IBLA 260 (1982).

Because there is insufficient factual description of the action to be undertaken and no analysis in the Decision Record of whether safe access to the new helipad has been maintained, we find the record to be lacking a reasoned analysis of the factors involved in approving BOR's right-of-way application. We therefore remand this matter to BLM for amendment to the Decision Record addressing whether safe access to the new helipad is or will be inhibited by improvements, including the solar panels, on the BOR site.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior 43 CFR 4.1, the decision appealed from is set aside and the case is remanded to BLM for action consistent with this opinion.

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John H. Kelly  
Administrative Judge

I concur:

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James L. Byrnes  
Chief Administrative Judge